

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

In re: JESUS HERRERA) OEIG Case #12-00339

OEIG FINAL REPORT (REDACTED)

Below is a final summary report from an Executive Inspector General. The General Assembly has directed the Executive Ethics Commission (Commission) to redact information from this report that may reveal the identity of witnesses, complainants or informants and “any other information it believes should not be made public.” 5 ILCS 430/20-52(b).

The Commission exercises this responsibility with great caution and with the goal of balancing the sometimes-competing interests of increasing transparency and operating with fairness to the accused. In order to balance these interests, the Commission may redact certain information contained in this report. The redactions are made with the understanding that the subject or subjects of the investigation have had no opportunity to rebut the report’s factual allegations or legal conclusions before the Commission.

The Commission received a final report from the Governor’s Office of Executive Inspector General (“OEIG”) and a response from the agency in this matter. The Commission, pursuant to 5 ILCS 430/20-52, redacted the final report and mailed copies of the redacted version and responses to the Attorney General, the Governor’s Executive Inspector General and to Jesus Herrera at his last known address.

The Commission reviewed all suggestions received and makes this document available pursuant to 5 ILCS 430/20-52.

FINAL REPORT

I. Allegation

The Chicago Transit Authority (CTA) Office of Inspector General (CTA-OIG) received anonymous complaints alleging that, while at work, Chicago Transit Authority (CTA) Garage Combination Senior Clerk Jesus Herrera viewed sexually explicit files on his personal laptop and his CTA-issued computer. The Office of Executive Inspector General (OEIG) assumed the investigation from the CTA-OIG pursuant to Section 75-10(b) of the State Officials and Employees Ethics Act.

II. Background

A. Jesus Herrera’s Job Duties as a Garage Combination Senior Clerk

Jesus Herrera works as a Garage Combination Senior Clerk at CTA’s 77th Street Garage. Mr. Herrera’s job duties include inventorying parts and completing daily inventory records. To perform his job duties, Mr. Herrera uses a CTA-issued computer. While multiple CTA

employees use this computer, each employee—including Mr. Herrera—accesses the computer by entering a unique username and password.

B. CTA-OIG Investigation and Jesus Herrera's March 7, 2012 Statement

On March 7, 2012, CTA-OIG investigators telephonically interviewed Mr. Herrera, in part, regarding his Internet usage and his use of a personal laptop at CTA.

On the same day, at the request of his then-manager, [Former Manager], Mr. Herrera completed and submitted a document titled, "Report to Manager." In his Report to Manager, Mr. Herrera agreed not to bring his personal laptop into work anymore¹ and stated: "for the record, I was never on any inappropriate site while on company time."

III. Investigation

A. OEIG Analysis of Jesus Herrera's CTA-issued Computer

During the OEIG investigation, investigators requested the Internet history for websites visited under Mr. Herrera's unique username from the CTA Information Technology department. In response, investigators received and reviewed a log of websites visited under this username from February 28, 2012 through June 18, 2012.² The investigators' review indicated that non-CTA related websites had been accessed under Mr. Herrera's username. Some of these websites contained links to adult-content websites.

On August 20, 2012, investigators seized Mr. Herrera's CTA-issued computer. OEIG investigators then conducted a forensic analysis of the computer. The analysis revealed that websites wholly unrelated to CTA business were accessed on this computer via Mr. Herrera's username.

B. Interview of CTA Garage Combination Senior Clerk Jesus Herrera

On November 20, 2012, investigators interviewed Jesus Herrera. Mr. Herrera said he has been a CTA employee for about 25 years and confirmed that he had used a CTA-issued computer to perform work duties. Investigators confirmed the username and password Mr. Herrera used when accessing the computer.

During his interview, Mr. Herrera said that he used his CTA-issued computer to access the Internet for personal reasons, such as accessing his bank account, checking his personal e-mail account, and paying personal bills. Mr. Herrera acknowledged that, at the time he accessed these websites, he knew he was violating CTA policy. Mr. Herrera stated that he ceased using a CTA computer or Internet for personal purposes on August 28, 2012, when his current manager sent out an e-mail communication reminding employees that they were prohibited from using the computer and Internet for personal use.³

¹ After the OEIG initiated its investigation, it verified with Mr. Herrera's manager ([Manager]) that Mr. Herrera stopped bringing his personal laptop to work.

² During this time period, activity on the log indicated that Mr. Herrera worked approximately 82 days.

³ The OEIG investigation confirmed that on August 28, 2012, [Manager] sent an e-mail to numerous CTA employees, including Mr. Herrera, in which he attached CTA Administrative Procedure 222 and said, "As a
(continued . . .)

Investigators then asked Mr. Herrera what he meant by “inappropriate site,” which he referenced in his March 7, 2012 Report to Manager. In response, he explained that an inappropriate website would be a “hardcore porn” site and then initially denied accessing “hardcore” porn websites. However, in response to further questioning, Mr. Herrera stated that:

- He accessed websites containing nudity on his CTA computer, but that he “can’t do it anymore,” because the CTA installed a website filter;⁴
- He opened e-mails from his personal e-mail account that contained links to porn websites and would look at “softcore”⁵ porn because he did not consider soft porn websites to be “inappropriate;”
- He had viewed porn websites during work hours and continued doing so until receiving [Manager’s] August 28, 2012 e-mail;
- He would delete his web browser’s cache and Internet history in an attempt to hide his activities;
- His March 7, 2012 Report to Manager statement, that he never visited any “inappropriate site,” was not true;
- He also used his CTA computer to view nude or semi-nude pictures of women that he sent to his personal e-mail account from his cellular telephone.
- He also visited other non-work related websites two to three times a day, including cheatingwomen.com, among others; and
- He spent about two hours a day, during his work hours, using his CTA computer to access the Internet for personal use.

At the conclusion of his interview, Mr. Herrera provided the OEIG with a written statement in which he wrote the following:

I, Jesus Herrera have in the past used company computer for personal business and have visited inappropriate websites as a result of personal poor judgment. I stand by this statement and will except [sic] the final consequences. I truly regret having done so, but the past is in the past and, we, “I” can only say [sic] will learn from my mistakes. I am truly sorry for having done all these on company time. I stand corrected on my written statement to my manager [Former Manager] in regards to not having visited inappropriate stites [sic].

OEIG investigators obtained no further statements from Mr. Herrera.

III. Analysis

A. Jesus Herrera Violated CTA’s Internet Usage Policy

reminder the CTA computers and phones are for company business **not for your personal use**. Conducting personal business on company time is subject to Corrective Action up to and including discharge.”

⁴ In late 2012 and early January 2013, investigators telephonically interviewed CTA Network Manager [Network Manager]. [Network Manager] stated that he could not provide an exact date, but did confirm that an Internet filter software program was installed on Mr. Herrera’s computer sometime in 2010. [Network Manager] stated that the Internet filter software generally blocked sites containing adult content, gambling or violence, including sites an employee attempted to access through imbedded links in emails. [Network Manager] explained, however, that CTA was not always able to block all pornographic websites or those displaying nudity.

⁵ He defined softcore websites as those displaying a “female with exposed breasts in provocative positions.”

CTA Administrative Procedure 222 (AP 222), “Internal and External Electronic Communication Policy,” provides that CTA computers and the Internet are to be used for work related activities, and that excessive use by employees for non-work purposes is prohibited. Furthermore, AP 222 explicitly states that “[a]ccessing sexual, pornographic or other inappropriate Web sites” or “sending or receiving sexual ... explicit or implicit ... images” may result in discipline.⁶

The evidence reveals that Mr. Herrera violated this policy and in fact he admitted to doing so on multiple occasions. Mr. Herrera admitted to utilizing CTA’s electronic communication equipment for personal matters for approximately two hours per day, for visiting pornographic or inappropriate websites, and receiving and viewing sexually explicit or implicit images. Accordingly, the allegation that Jesus Herrera violated AP 222 by improperly using his CTA-issued computer is **FOUNDED**.

B. Jesus Herrera Violated CTA’s Rule on Personal Conduct

The “Personal Conduct” provision in the CTA’s General Rule Book provides that CTA employees may not engage in certain activities. As set forth below, Mr. Herrera’s conduct violated this provision in the various manners described below.

1. Jesus Herrera Engaged in Conduct Unbecoming an Employee

The CTA’s Personal Conduct provision prohibits employees from engaging in conduct unbecoming an employee.⁷ Mr. Herrera admitted to misusing his CTA-issued computer by viewing sexually explicit material either from the Internet or from his personal email account, and receiving inappropriate images. Mr. Herrera’s actions are highly inappropriate and constitute conduct unbecoming an employee. Indeed, Mr. Herrera’s actions of attempting to obfuscate his Internet history by deleting the cache and web browser history are evidence that Mr. Herrera understood the impropriety of his actions. Thus, the allegation that Mr. Herrera engaged in conduct unbecoming an employee is **FOUNDED**.

2. Jesus Herrera Falsified a Written Statement

The CTA’s Personal Conduct provision prohibits CTA employees from falsifying a written statement.⁸ However, on March 7, 2012, Mr. Herrera wrote a false statement when he completed a Report to Manager in which he stated that “for the record, I was never on any inappropriate site while on company time.” Given that Mr. Herrera admitted to visiting pornographic websites during work hours, and admitted that this statement was false, the allegation that Mr. Herrera falsified a written statement is **FOUNDED**.

3. Jesus Herrera Performed Personal Work While on Duty

⁶ AP 222, IV on “Discipline,” numbers 14, and 15.

⁷ CTA General Rule Book (effective 10/01/1989), “Personal Conduct,” rule 14(e).

⁸ *Id.* at 14(j).

The CTA's Personal Conduct provision prohibits employees from performing personal work while on duty.⁹ By his own admission, Mr. Herrera used his CTA-issued computer to access the Internet for personal reasons, such as accessing his bank account, checking his personal e-mail account, and paying personal bills. Mr. Herrera also admitted to knowing that, at the time he accessed these websites, he violated CTA policy. Thus, the allegation that Mr. Herrera performed personal work while on duty is **FOUNDED**.

4. *Jesus Herrera Abused Company Time*

The CTA's Personal Conduct provision also prohibits employees from abusing company time.¹⁰ Mr. Herrera told investigators that he spent approximately two hours a day, during his work hours, using his CTA computer to access the Internet for personal use. These are two hours a day that Mr. Herrera should have been performing CTA-related work duties. Therefore, the allegation that Mr. Herrera abused company time is **FOUNDED**.

C. **Loss to the CTA**

From February 28, 2012 through June 18, 2012,¹¹ the OEIG finds that the total loss stemming from the misconduct of Jesus Herrera to the CTA is over \$5,000. The OEIG calculated the loss by taking the number of hours Mr. Herrera admitted to being engaged in non-State activities (approximately 2 hours a day), multiplied by Mr. Herrera's hourly wage (\$31.99), and then multiplied by the number of days that Mr. Herrera worked during this time period (82).

IV. **Recommendations**

Following due investigation, the OEIG issues these findings:

- **FOUNDED** – Jesus Herrera violated CTA Administrative Procedure 222 by viewing inappropriate images and websites on his CTA-issued computer and using it excessively for personal matters.
- **FOUNDED** – Jesus Herrera violated the CTA's "Personal Conduct" provision by engaging in conduct unbecoming an employee.
- **FOUNDED** – Jesus Herrera violated the CTA's "Personal Conduct" provision by falsifying a written statement.
- **FOUNDED** – Jesus Herrera violated the CTA's "Personal Conduct" provision by performing personal work while on duty.
- **FOUNDED** – Jesus Herrera violated the CTA's "Personal Conduct" provision by abusing company time.

The OEIG recommends that the CTA terminate Jesus Herrera.¹²

⁹ *Id.* at 14(q).

¹⁰ *Id.* at 14(w).

¹¹ These are the dates that the OEIG was able to secure the records of Mr. Herrera's Internet usage. While Mr. Herrera admits to engaging in conduct beyond these dates, the OEIG limits the instant analysis to the dates for which it has records reflecting that Mr. Herrera engaged in misconduct.

¹² The OEIG calculated the loss to the CTA stemming from Mr. Herrera's misconduct to be over \$5,000. Thus, the OEIG is obligated to refer this matter to the Illinois Attorney General's Office pursuant to 5 ILCS 430/20-80.

No further investigative action is warranted and this case is considered closed.

Date: January 31, 2013

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

CHICAGO TRANSIT AUTHORITY, an)
 Illinois municipal corporation,)
)
 Plaintiff,)
)
 v.)
)
 AMALGAMATED TRANSIT UNION, LOCAL 241,)
)
 Defendant-Respondent.)

14 CH 17765
Hon. Kathleen M. Pantle

ORDER

Having failed to convince an arbitration committee that there was sufficient evidence to uphold the Plaintiff Chicago Transit Authority's (the "CTA") discharge of employee Jesus Herrera, the CTA now requests that this Court consider evidence ruled inadmissible at the arbitration hearing to support the CTA's contention that a non-existent public policy was violated by the decision below. After a hearing, the arbitration committee found that the CTA had failed present evidence sufficient for it to meet its burden of proof. Also, despite the lack of sufficient evidence of any wrongdoing on Herrera's part, the CTA seeks a ruling that the decision of the arbitration committee violated public policy. The CTA filed a complaint to vacate the Arbitration Award (the "Award") on these grounds and now moves for summary judgment.

Defendant the Amalgamated Transit Union, Local 241 ("ATU" or "Local 241") has filed a cross-motion for summary judgment. ATU also moves for confirmation of the Award pursuant to section 12(d) of the Uniform Arbitration Act. 720 ILCS 5/12(d).

Plaintiff's motion for summary judgment is denied.

Defendant's motion for summary judgment is granted.

The Arbitration Award is confirmed.

Background

The ATU is the exclusive bargaining agent, as defined in Section 3(f) of the Illinois Public Labor Relations Act, of certain employees of the CTA. 5 ILCS 315/1 *et seq.* The relationship between the CTA and its union employees is governed by a Collective Bargaining

Agreement effective January 1, 2007 through December 31, 2011, which was subsequently modified by a tentative agreement effective January 1, 2012 through December 31, 2015. Collectively, these two agreements ("CBA") govern the terms and conditions of employment for CTA employees that are represented by Local 241.

The CBA limits CTA's ability to discipline and discharge employees to situations in which "sufficient cause can be shown." (Compl. ¶ 5, Ex. 3 § 2.6). The CBA also contains grievance and arbitration provisions that govern both the processing of grievances and the arbitration process. (Compl. ¶¶ 9-11, Ex. 3, Art. 16-17). With respect to the arbitration process, the CBA provides that "[t]he decision of the majority of the arbitration committee shall be final, binding, and conclusive upon the Union and the Authority." (Compl. ¶ 10, Ex. 3 § 17.4).

On February 15, 2013 the CTA fired Herrera for allegedly spending hours of each work day visiting pornographic sites using a CTA computer. Herrera had worked as a maintenance clerk for the CTA. Local 241 grieved the discharge in accordance with the Grievance and Arbitration Procedures by filing Grievance No. 13-0210. The Grievance challenged whether the CTA had sufficient cause to discharge Herrera. Local 241 moved the Grievance to arbitration and the parties selected Arbitrator James R. Cox as the impartial chairman of the arbitration committee in accordance with the Grievance and Arbitration Procedures.

An arbitration hearing was held on April 10, 2014. Each side presented evidence and post-trial briefs before a decision was made. The issue presented was "whether the CTA had sufficient cause to discharge Jesus Herrera effective February 15, 2013 and, if not, what is the proper remedy?" On August 8, 2014, Chairman Cox issued the Award sustaining the Grievance and ordering Herrera to be reinstated with full back pay, seniority, and benefits. That same day, the Local 241-appointed arbitrator signed the Award at which point it was signed by a majority of the members of the arbitration committee and became "final, binding, and conclusive" upon both ATU and the CTA.

Cox issued a written decision in which he engaged in an extensive discussion of the evidence. After this extensive discussion he found, among other things:

"The obvious flaw in the CTA Case is their unsupported and unwarranted reliance on unsupported statements Grievant had reportedly made to the OEIG.¹ Here the CTA

¹ The OEIG is the State of Illinois' Office of Executive Inspector General.

improperly relied on purported statements to the OEIG as admissions yet there was no legal foundation laid for the receipt of such statements.

(Pl. MSJ, Ex. O, pp. 8-9).

Cox also pointed out the lack of first hand evidence of what Herrera may have told OEIG's investigators. (*Id.* at p. 9). Cox found that the CTA did not conduct its own investigation. (*Id.*) No representative from OEIG testified at the arbitration hearing to substantiate their claim that Herrera had made certain admissions. (*Id.*) No one testified as to the results of an alleged forensic examination done on Herrera's computer. (*Id.*) Witnesses from the CTA relied solely on the OEIG report. (*Id.* p. 11).

Cox also ruled that the OEIG report could not be admitted under either the Federal Rules of Evidence or the Illinois Rules of Evidence. (*Id.* pp. 11-12) The CTA had sought admission of the report under Rule 902(5) (which is the same Rule under both the FRE and the IRE). Rule 902(5) states:

The following items of evidence are self-authenticating, they require no extrinsic evidence of authenticity in order to be admitted:...

5) Official Publications: A book, pamphlet, or other publication purporting to be issued by a public authority.

FRE 902(5); IRE 902(5) (*Id.* p. 12).

Cox found that the OEIG Report was not an official publication and that "Rule 902(5) was not intended to confer authenticity on a report such as the one submitted here by the CTA" as it has "historically been used to dispense with preliminary proof of the genuineness of purportedly official publications, most commonly in connection with statutes, court reports, rules, regulations and the like." (*Id.*) Cox found that official publications are nothing like the OEIG report which is the "output of an investigation with serious disciplinary ramifications, about which there is nothing in the record." (*Id.*) Cox also found "The report itself is not signed and the methods by which the Grievant's computer was analyzed are not identified." (*Id.*) (emphasis in original).

The CTA also urged the arbitration committee to consider the "party admissions" contained in the OEIG report which they declined to do because the alleged "party admissions" were inadmissible hearsay as no investigator from the OEIG was called to testify. Cox found

that the “admissions” remain inadmissible hearsay in the absence of detailed, credible testimony as to the circumstances under which they were obtained.” (*Id.*).

Cox concluded that the CTA failed to present evidence sufficient to meet its burden of proof. (*Id.* p. 13). Cox found a further due process violation where Herrera was not provided with the opportunity to challenge the findings upon which his discharge is based.

Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill.2d 90, 102 (1992). Where reasonable people could draw different inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & E. Railway Co.*, 165 Ill.2d 107, 114 (1995). When parties file cross-motions for summary judgment, they believe that there are no genuine issues of material fact, only questions of law. *Gaylor v. Village of Ringwood*, 363 Ill.App.3d 543, 546 (2006). “Where genuine issues of material fact exist, however, the mere filing of cross-motions for summary judgment does not require that the court grant the requested relief to one of the parties.” *Hagen v. Distributed Solutions, Inc.*, 328 Ill. App.3d 132, 137 (1st Dist. 2002).

Law Applicable to Arbitrations

A court’s review of an arbitrator’s award “is more limited than the review of a trial court’s decision.” *Galasso v. KNS Cos.*, 361 Ill. App. 3d 124, 130 (1st Dist. 2006) (internal citations omitted). Courts have held that in order to “maintain arbitration’s essential virtues of resolving disputes straightaway,” vacating an arbitrator’s decision occurs only in “very unusual circumstances.” *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (internal citations omitted). This limited scope of review “fosters the long-accepted and encouraged principle that an arbitration award should be the end, not the beginning, of litigation.” *Perkins Rests. Operating Co., L.P. v. Ban Den Bergh Foods Co.*, 276 Ill. App. 3d 305, 309 (1st Dist. 1995) (internal citations omitted).

Section 12(a) of the Uniform Arbitration Act lists circumstances under which a court shall vacate an arbitration award, none of which apply here because section 12 does not apply to

any award entered as a result of an arbitration agreement which is part of or pursuant to a collective bargaining agreement. 725 ILCS 5/12(a) and (e). The grounds for vacating such an award are those which existed prior to the enactment of the UAA. 725 ILCS 5/12(e). The common law grounds for vacating an award are fraud, corruption, partiality, misconduct, mistake or failure to submit the question to arbitration. *Water Pipe Extension, Bureau of Eng'g Laborers' Local 1092 v. City of Chicago*, 318 Ill. App.3d 628, 636 (1st Dist. 2000); *Chicago Transit Auth. v. Amalgamated Transit Union, Local 308*, 244 Ill. App.3d 854, 859 (1st Dist. 1993). Additionally, a court is duty-bound to enforce a labor-arbitration award if the arbitrator acts within the scope of his authority and the award draws its essence from the parties' collective bargaining agreement. *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union, Local 1600*, 74 Ill.2d 412, 418 (1979). "There is a presumption that the arbitrator did not exceed the scope of his authority. Therefore, if the arbitrator acted in good faith, the award is conclusive upon the parties." *Cook County v. American Fed'n of State, County & Muni. Employees, Dist. Council 31, Local 3315*, 294 Ill. App.3d 985, 988 (1st Dist. 1998) (internal citation omitted).

Also, "[c]ourts have crafted a public policy exception to vacate arbitral awards which otherwise derive their essence from a collective bargaining agreement." *American Fed'n of State, County & Muni. Employees v. Dep't of Central Management Services*, 173 Ill.2d 299, 306 (1996) ("*DuBose*"). In order to successfully vacate an arbitration award on public policy grounds, the contract "as interpreted by the arbitrator, must violate some explicit public policy." *Id.* at 307 (emphasis in original). "In this respect, the exception is a narrow one and is invoked only when a contravention of public policy is clearly shown." *Id.*

Analysis

Defendant's Motion for Summary Judgment

The Award draws its essence from the CBA

Chairman Cox interpreted the "sufficient cause" provision in the CBA and based the Award on this interpretation. The Award therefore draws its essence from the CBA.

The United States Supreme Court has stated that in order for an award to draw its essence from the CBA, an arbitrator need only construe and apply the contract:

The arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguable construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

Moreover, an arbitration award "draws its essence" from the CBA when the arbitrator has "limited himself to interpreting the collective bargaining agreement." *Board of Educ. Of Cmty. High School Dist. No. 155 v. Illinois Educ. Labor Relations Bd.*, 247 Ill. App.3d 337, 345 (1st Dist. 1993). A court cannot substitute its own interpretation even if "the arbitrator's interpretation was not only wrong, but plainly wrong." *Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991).

In this case, the arbitrator's decision not only drew its essence from the contract, but there was absolutely no error in his interpretation. The CTA totally and wholly failed to prove any wrongdoing on the part of Herrera because it introduced no competent evidence to support its case. Rather, the CTA relied on an unsigned, unauthenticated OEIG report as its evidence of wrongdoing. The arbitrator correctly ruled it was inadmissible as it was not an "Official Publication" within the meaning of Rule 902(5); rather, it was allegedly an investigation into particular accusations of wrongdoing, not a "book, pamphlet, or other publication". Indeed, it is not a publication at all given the warning at the bottom of the title page which indicates that the report is "CONFIDENTIAL", that it can only be share with certain listed entities, and that it is not subject to the Freedom of Information Act. (Pl. MSJ, Ex. J, p. 1). "Publication" is defined as "the act or process of producing a book, magazine, etc. and making it available to the public." *Merriam-Webster Dictionary*. Given that the public has no right to see the OEIG report, it cannot qualify as a "publication". Also, there is no other authority which would allow for the admission of the OEIG report as substantive evidence, and further, the CTA failed to lay any foundation for its admissibility.

Further, the CTA failed to call any witnesses who allegedly heard Herrera make any admissions. The CTA failed to call any witnesses who could competently testify that an analysis of Herrera's computer showed that it was used for a non-business purpose and used for the purpose of accessing pornographic websites. The CTA did not call any witnesses who testified.

that they observed Herrera commit any rule violations. Needless to say, the lack of evidence on the CTA's part amply supports the conclusion that the arbitrator committed no error, correctly interpreted the CBA, and his interpretation (aside from being correct) drew its essence from the CBA.

Plaintiff's Motion for Summary Judgment

The alleged "public policies" cited by the CTA do not exist

The CTA contends that there is a "well-defined and dominant public policy" that favors expenditures of public funds in as cost effective and efficient manner as possible and that "tax-supported entities such as the CTA" are to "conserve public resources." The CTA argues that this purported public policy is contravened by the Award because (1) it purportedly forces the CTA to conduct its own independent investigation regardless of whether the OEIG has already used public funds to investigate a matter, and (2) it requires the CTA to reinstate Herrera and presumes he will abuse company time in the future, which would be a gross misuse of taxpayer money.

In order to vacate an award on public policy grounds, the CBA, as interpreted by the arbitrator, must violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *DuBose*, 173 Ill.2d at 307. The Supreme Court has found that the public policy exception to arbitration cases is extremely narrow and that the violation of public policy must be clearly shown. *United Paperworkers International Union*, 484 U.S. at 43. "While there is no precise definition of public policy, it is to be found in the Constitution, in statutes, and, when these are silent, in judicial decisions." *AFSCME v. State of Illinois*, 124 Ill.2d 246, 260 (1988).

"The public policy exception requires a two-step analysis. The initial question is whether a well-defined public policy can be identified. If there is a definitive public policy, then the next question is whether the arbitrator's award, as reflected in his interpretation of the agreement, violated public policy." *State v. AFSCME, Council 31, AFL-CIO*, 321 Ill. App.3d 1038, 1041 (5th Dist. 2001).

The myriad Constitutional provisions and statutes cited by the CTA do not support the CTA's position that the public policy which it claims is "well-defined and dominant" exists such that it justifies vacating the Award. Regardless of the fact that all taxpayers expect and hope that public bodies will use resources in a cost effective and efficient way, there is no public policy that mandates that this is the law in Illinois. The Supreme Court has found that even if a proposition is "firmly rooted in common sense", "a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement." *United Paperworkers Int'l Union*, 484 U.S. at 44.

Indeed, such a public policy is impossible to achieve as there would be a multitude of disputes as to what constitutes "cost effectiveness" and "efficiency". None of the statutes or the Constitutional provision cited by the CTA mandates that the CTA spend every dollar in a cost effective and efficient way. The only provision that uses the terms "effective[]" and "efficient" is Section 2.01(b) of the RTAA, which addresses the allocation of responsibility for public transit given to the Regional Transportation Authority, not the CTA. Section 2.01(b) provides that the RTA must review the capital plans and expenditures of the transit service boards under its authority, which includes the CTA. The purpose of the review is to ensure that the RTA, not the CTA, can budget and expend funds with maximum effectiveness and efficiency.

Indeed, the CTA cites to no case law or any other authority that recognizes such a public policy. The reason for this is simple: there is none. The only public policy recognized with regard to the CTA is its duty to provide safe transit. *Chicago Transit Authority v. Amalgamated Transit Union, Local 241*, 399 Ill. App.3d 689, 696 (1st Dist. 2010). This decision was hardly surprising given that the grievant-bus driver in that case had been convicted of the aggravated criminal sexual abuse of his stepdaughter, and there is a strong public policy that exists favoring the protection of the public, including children, from convicted sex offenders. *Id.* at 690, 697.

Moreover, even if there were such a public policy (which there is not) "cost effectiveness" and "efficiency", are not defined by the legislature in terms of spending money in any particular way. Often, government agencies must expend funds in order to best serve the public interest, e.g. the Illinois Tollway Authority needed to perform substantial work on the bridges over the Addams Tollway in order to widen the highway which serves the public interest

by allowing traffic to move in a more expeditious manner. In any event, it is cost effective and efficient for a public agency such as the CTA to expend money to honor its contractual commitments. When the CTA loses at arbitration it has no choice but to honor its contractual commitments, and therefore it is spending money in a cost effective and efficient way.

In any event, the CTA's essential claim, *i.e.* that it can avoid the consequences of its own breach of the CBA, by relying on "public policy", is untenable in light of the fact that, should the Court accept such an argument, it would be giving *carte blanche* to the CTA to violate the CBA whenever the CTA felt that its money could be spent in a better manner. The Court will not grant the CTA the power to avoid compliance with the CBA and an arbitration award by recognizing some supposed public policy that favors the discharge of employees where the discharge violates the terms of the CBA.

The Award cannot violate public policy where the CTA proved no wrongdoing on the part of Herrera

Even if there were a fiscal conservatism public policy as espoused by the CTA, it was not violated where the CTA failed to prove any wrongdoing on the part of Herrera, and therefore the CTA has failed to prove that taxpayer dollars are at risk of being spent inappropriately. The CTA's position suffers from a fatal flaw: the CTA's argument completely ignores the fact that it failed to prove that Herrera ever viewed any pornography on company time and on the company computer much less that he engaged in the "gross theft of company time" that the CTA accuses him of engaging in. Rather, the CTA asks this Court to presume that it met its burden of proof and that the arbitrator's decision was therefore against public policy. The CTA failed to meet its burden of proof because, in part, it failed to call the witnesses against Herrera—the OEIG investigator or investigators who attribute certain admissions to Herrera—thereby failing to properly lay the proper evidentiary foundation for either the admission of the report or the admission of Herrera's alleged statements. Indeed, the report was not even signed and essentially the CTA went to hearing with an unauthenticated report, which was properly not admitted into evidence, as its proof of wrongdoing on the part of Herrera. The CTA also failed to present any proof of the means by which Herrera's computer was analyzed, thereby failing to lay any foundation for the admission of such evidence. The alleged evidence of the analysis of the computer was contained in the same unauthenticated report from the OEIG, which means it had no evidentiary value. As the only witnesses called by the CTA testified that they relied on the

inadmissible OEIG report, there was no evidence of any wrongdoing. Any “facts” cited by the CTA in support of its argument are not “facts” at all—they are merely expressions of what the CTA wished it had proved, but did not. Due to the CTA’s failure to prove its case, the parade of horrors (which include an allegation of sexual harassment even though Herrera was never charged with violating a CTA policy against sexual harassment in this case) espoused by the CTA have no basis. Moreover, any facts related to Herrera’s prior discipline are irrelevant as the arbitrator made no findings of fact regarding this prior discipline—it was completely unnecessary to reach any due to the failure of the CTA to prove the charged misconduct.

Given that the CTA failed to present any admissible evidence of Herrera’s alleged wrongdoing, thereby losing at arbitration, it cannot be heard to complain that the Award somehow violates public policy. It is not a violation of any public policy for an arbitration committee to reverse a decision to discharge an employee where the employer utterly and completely fails to prove any wrongdoing on the part of the employee that would justify the discharge of the employee. Indeed, it would be a complete injustice for an arbitration committee to uphold the discharge of an employee where the employer failed to meet its burden of proof. Such a decision would be a mockery of the entire arbitration procedure, and therefore there is no violation of any public policy where, as here, the arbitration committee ruled in accordance with the law and the CBA. The CTA’s status as a public entity does not entitle it to avoid its obligations to prove its case in arbitration with admissible evidence, and no “public policy” considerations entitle it to breach a contract.

The arbitrator did not require the CTA to perform two investigations

The CTA grossly misreads the decision of the arbitrator and accuses the arbitrator of requiring that it duplicate the investigation of the OEIG. In rendering his decision, Cox observed, “Here the CTA did not conduct its own investigation.” Any other observation on the part of Cox as to the lack of an investigation on the part of the CTA was not tantamount to a finding that the CTA had to conduct its own investigation before a ruling favorable to the CTA could be rendered. At no time did Cox rule that the CTA could not rely on a report issued by the OEIG. He was merely rightfully concerned with the lack of proper authentication of the OEIG report and the CTA’s failure to call a live witness that could substantiate the allegations in the

report. Additionally, there is nothing improper about an arbitrator commenting on the evidence before him and reaching a conclusion of law supported by the evidence.

Moreover, reading the comments in context shows that Cox was merely commenting on the evidence before him and pointing out that the CTA's case was wholly dependent on the OEIG's report coming into evidence as substantive evidence. Since the OEIG report was inadmissible, the CTA had no case because it failed to produce any witnesses who could testify about observing Herrera acting inappropriately or who could testify about the results of a forensic evaluation of Herrera's computer. It was the CTA's choice to proceed by seeking to admit the OEIG report as substantive evidence rather than calling witnesses, and the CTA cannot now blame the arbitrator for its strategy decisions. The arbitrator never required the CTA to conduct its own investigation and any argument to the contrary is not supported by the record.

Additionally, Cox did not find that Herrera's due process rights were violated because the CTA failed to conduct its own investigation. Rather, Cox pointed out that the union had raised this alleged violation as a reason to reverse the decision to discharge Herrera. (*Id.* p. 13). Cox found it unnecessary to reach this issue because the CTA failed to meet its burden of proof. (*Id.*)

The decision of the arbitration committee is affirmed.

The Arbitration Award is confirmed.

This is a final Order disposing of all litigation in this matter.

DATE: October 1, 2015

ENTERED
 JUDGE KATHLEEN M. PANTLE-1775
 OCT 01 2015
 DOROTHY BROWN
 CLERK OF THE CIRCUIT COURT
 OF COOK COUNTY, IL
 DEPUTY CLERK

Kathleen M. Pantle